

Message Text

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COMMERCE - KBAKKE (PHONE)

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E.O. 11652: N/A

TAGS: ETRD, OECD, GW

SUBJECT: WORKING PARTY 7, COMMITTEE OF EXPERTS ON
RESTRICTIVE BUSINESS PRACTICES

PASS JOEL DAVIDOW (JUSTICE DEPT) AND JOHN FISCHBACH (FTC)
ATTENDING WP-7 MEETING, 4/11

1. DEPARTMENT UNDERSTANDS THAT WORKING PARTY 7 WILL
CONSIDER AT APRIL 11 MEETING DOCUMENT DAF/RBP/WP7/23
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PREPARED BY FRG DELEGATE. COMMERCE DEPT HAS EXPRESSED

CONCERN ABOUT WHAT IT CONSIDERS OVERLY BROAD SCOPE OF STUDY PROPOSED BY GERMAN DOCUMENT.

2. FEDERAL TRADE COMMISSION AND DEPARTMENTS OF STATE AND JUSTICE SHARE COMMERCE CONCERN, AS EXPRESSED IN FOLLOWING RELEVANT PARAGRAPHS OF RECENT MEMO FROM COMMERCE DEPARTMENT GENERAL COUNSEL KARL BAKKE: QUOTE

-- A) THIS PAPER OUTLINES AREAS OF POSSIBLE STUDY UNDER THE BROAD HEADING OF TRADEMARK LAW AND COMPETITION POLICY. APPARENTLY, THE OBJECTIVE WOULD BE TO IDENTIFY PRACTICES OF ENTERPRISES IN CONNECTION WITH THE MAINTENANCE, PROTECTION AND EXPLOITATION OF TRADEMARK RIGHTS WHICH AFFECT COMPETITION. THIS WOULD BE FOLLOWED BY DEVELOPMENT OF A

LIST OF THOSE PRACTICES WHICH RESULT IN SUBSTANTIAL RESTRAINTS.

-- B) THE PRACTICES WHICH WOULD BE EXAMINED, ACCORDING TO GERMANY'S PROPOSAL, ARE BROAD IN SCOPE, INCLUDING NOT ONLY CLAUSES IN TRADEMARK LICENSING AND DISTRIBUTION AGREEMENTS, BUT ALSO PRACTICES RELATING TO THE VERY BASIS OF RIGHTS IN MARKS (PARAGRAPH 5), THE PROTECTION OF MARKS AGAINST INFRINGEMENT BY IMPORTATION OF A PRODUCT BEARING THE SAME MARK WHICH IS PROTECTED BY ANOTHER IN A DIFFERENT COUNTRY (PARAGRAPH 6), AND THE PROCESS OF GRANTING TRADEMARK RIGHTS (PARAGRAPH 6).

-- C) IT SHOULD BE QUESTIONED WHETHER THE OBJECTIVES OF A STUDY OF TRADEMARK PRACTICES OF SUCH BROAD SCOPE ARE JUSTIFIED OR IN THE BEST INTEREST.

-- D) A LISTING OF "DISFAVORED" ACTIONS IN THE FIELD OF TRADEMARK/ANTITRUST LAW COULD WELL SERVE TO SOLIDIFY NATIONAL POSITIONS AS TO THESE MATTERS IN WAYS WHICH WE BELIEVE MAY DISRUPT EXISTING PATTERNS OF TRADEMARK EXPLOITATION OF UNITED STATES COMPANIES THAT SUPPORT OUR MARKET POSITIONS. THIS IS PARTICULARLY LIKELY IF, AS WE EXPECT, THE LISTING SEEKS TO EXPAND ANTITRUST PROSCRIPTIONS IN THIS FIELD BEYOND THOSE APPLICABLE UNDER UNCLASSIFIED

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PRESENT LAW IN THE UNITED STATES.

-- E) ADDITIONALLY, PUBLICATION OF SUCH A LIST WILL SURELY BE UTILIZED BY PERSONS REPRESENTING DEVELOPING COUNTRY INTERESTS IN UNCTAD AND OTHER FORA IN SUPPORT OF LIMITATIONS ON THE EXPLOITATION AND PROTECTION OF TRADEMARKS IN THOSE COUNTRIES.

-- F) IN SHORT, OUR DIFFICULTY IS IN TRYING TO UNDER-
STAND THE VALUE FROM THE STANDPOINT OF THE UNITED STATES'
INTERESTS OF THIS STUDY. ONE POSSIBLE EXCEPTION IS IN
REGARD TO THE PARALLEL IMPORTATION QUESTION, ALTHOUGH
THIS SUBJECT COULD SCARCELY BE CONSIDERED AS ONE INVOLVING
ANTITRUST LAW. A RECENT DECISION OF THE EEC COUNCIL
CONCERNING THE MARK "CAFE HAG" SEEMS TO HAVE CREATED
TREMENDOUS UNCERTAINTY IN WESTERN EUROPE AS TO HOW TO
PROTECT TRADEMARK RIGHTS LEGITIMATELY ESTABLISHED ON A
TERRITORIAL BASIS WITHIN THE EEC AGAINST INFRINGEMENT.
THIS CASE MAY EVEN HAVE IMPLICATIONS WITH RESPECT TO
MARKS USED ON PRODUCTS SOLD IN THE COMMON MARKET BY OUT-
SIDE ENTERPRISES. (NOTE: WE WOULD BE INTERESTED IN
INFORMATION AS TO THE OPINION IN WESTERN EUROPEAN GOVERN-
MENTAL CIRCLES CONCERNING THIS DECISION.) UNQUOTE

3. U.S. DELEGATION SHOULD TAKE COMMERCE MEMO INTO CON-
SIDERATION IN DEALING WITH GERMAN PROPOSAL AND OTHER
AGENDA ITEMS. KISSINGER

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